LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 24 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 854

MARVIN FEINBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY LEO ROTHSCHILD,
Counsel for Petitioner.

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	4
The Constitutional and Statutory Provisions Involved	5
U.S.C. Title 28, § 2101(f)	5
Constitution of the United States	5
Federal Rules of Criminal Procedure, Rule 48(b)	6
U.S.C. Title 18, § 2312	6
U.S.C. Title 18, § 2	6
U.S.C. Title 18, § 371	7
U.S.C. Title 18, § 3282	7
Statement	7
Argument and Reasons for Allowing the Writ	8
Unexplained substantial delay in indicting an accused, violates the Constitutional requirement that "the accused shall enjoy the right to a speedy and public trial"	11
There should have been a preliminary independent inquiry into whether Petitioner's statement was voluntary	16
The admission of testimony as to the Pontiac car, as to which Petitioner had been acquitted, subjected Petitioner to double jeopardy	19
Conclusion	20
Appendix A—Opinion of the Court of Appeals	21
Appendix B—Opinion of Wyatt, *D. J.*, on Motion to Dismiss Indictment	42
Appendix C—Extracts from the "General Docket" of the United States Court of Appeals for the Second Circuit	44

PAGE

Appendix D—Court of Appeals Judgment and Entry Thereof in the District Court 45

Appendix E—Court of Appeals Order Granting Further Stay and Recalling Mandate 47

CASES CITED

Abbate v. U. S., 395 U. S. 187 19

Blockburger v. U. S., 284 U. S. 299 19

Commissioner v. Estate of Bedford, 325 U. S. 283 4

Escobedo v. Illinois, 378 U. S. 478 .....16, 17

Hill v. Hawes, 320 U. S. 520 4

Jackson v. Denno, 378 U. S. 368 .....10, 18

Johnson v. New Jersey, 384 U. S. 719 17

Klopfer v. State of North Carolina, 386 U. S. 213 .. 15

Miranda v. Arizona, 384 U. S. 436 .....16, 17

People v. Winfrey, 20 N. Y. 2nd 138 15

Potts v. Flax, 313 F. 2d (1963), 284, 290-1 4

Rosenbloom v. U. S., 355 U. S. 80 4

U. S. v. Ewell, 383 U. S. 116 19

U. S. etc. v. Harbin ([1967]), 377 F. 2nd 78 9

United States v. Inman, 352 F. 2nd (CA 4) 954 18

U. S. v. Maybury, 274 F. 2d 899 19

U. S. v. Sells, 325 F. 2d 161 19

Wan v. U. S., 266 U. S. 1 .....16, 17

Will v. United States, decided November 13, 1967, not yet published 20

Woody v. United States, 379 F. 2nd (C.A. D.C.) 130 .. 18

STATUTES

PAGE

28 U.S.C., § 2101(f) 4, 5

28 U.S.C., § 1254(1) 2

U.S.C. Title 18, §§ 2312 and 2, and § 371 .....2, 6, 7

U.S.C. Title 18, § 3282 7

Constitution of the United States
Amendment V 5, 10, 14
Amendment VI 6, 9, 10, 14

Federal Rules of Criminal Procedure
Rule 5(a) 17
Rule 48 .....1, 5, 6

N. Y. Penal Law § 1308 ..... 5, 7

U. S. Supreme Court
Rule 19b 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

MARVIN FEINBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 31, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals has not as yet been published. Appended hereto is a copy thereof (Appendix A).

The opinion of Wyatt, D. J., denying a motion to dismiss the indictment because defendant's right to a "speedy trial", guaranteed by the Fifth and Sixth Amendments, had been violated, and because of "unnecessary delay in presenting the charge to a grand jury" [Fed. Rules of Criminal Procedure, 48(b)], has not been published. Appended hereto is a copy thereof (Appendix B).

* References thus: "4a", are to Appellant's certified Appendix handed up with the certified transcript; "Tr." to the typewritten appendix.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

The jurisdiction of the District Court was based on U.S.C. Title 18, §§ 2312 and 2, and § 371.

The unusual and unfortunate situation presented on this application requires the following particularized statement:

The following facts are shown by the Court of Appeals Docket (Appendix C, *infra,* p. 44) and the proceedings certified to this court:

On July 31, 1967, the judgment of the Court of Appeals was "filed".

On August 14, 1967, Petitioner applied to the Court of Appeals for rehearing and, in the alternative, for a stay, pending application to this Court for certiorari.

On August 25, 1967, rehearing was denied by the Court of Appeals, but the mandate stayed, under Court of Appeals Rule 28(c). However, this was unknown to the undersigned attorney and counsel for Petitioner, who had, on retirement of Petitioner's former attorney, appeared for Petitioner, as his attorney, for the first time on the application for rehearing, and as such attorney submitted the petition. It is not disputed that the Clerk of the Court of Appeals did not send the customary notice of entry of the Court of Appeals' judgment to undersigned attorney and counsel. Moreover, the customary publication of the fact that decision had been rendered, did not appear in the New York Law Journal. In the meantime, undersigned attorney and counsel was relying upon the customary practice that the Clerk would send him a notice; and, in addition, was following the New York Law Journal for publication of the fact of decision, which publication was not made. He was not concerned about what he thought was prolonged delay in the rendering of the Court's decision, because—bearing in mind that the Court of Appeals had taken nine months to promulgate its affirmance of the District Court conviction—he assumed that the Court, with

equal deliberation, was considering the petition for rehearing. Furthermore, it being in the midst of the summer, undersigned attorney and counsel assumed that the appropriate panel of the Court had not convened, and that, therefore, it was not unreasonable to expect that decision would come down much later—after the summer had passed. There was no negligence on the part of Petitioner's attorney and counsel. He was conforming to standard practice and relying on standard performance of the duties of the Court of Appeals' clerical staff. In a populous community such as is New York City, with the widespread locations of the offices of the attorneys practicing therein, daily personal inquiry at the Courthouse is not and cannot be made—and it is not made.

Though undersigned attorney and counsel did not even know that a stay had been granted, the Court of Appeals, on October 25, 1967, "Issued Mandate (opinion and judgment)" [Appendix C, *infra,* p. 44].

Thus, undersigned attorney and counsel was not alerted to the fact that rehearing decision had been made by the Court of Appeals, and a stay granted. It was not until November 10, 1967, when he learned from Petitioner, that Petitioner's former attorney had communicated to him, on that day, that he was required to surrender on November 15, 1967. Since the offices of the entire federal court establishment, including the office of the Clerk of the Court of Appeals, were closed on November 10, 1967—which was, by the federal courts in the Southern District, celebrated as Veterans' Day—and since the following days were Saturday and Sunday, no information or explanation was obtainable until Monday, November 13, 1967. Application was promptly made, on that very day—i.e., November 13, 1967—by undersigned attorney and counsel, for a further stay; and, on that same day, the application was granted, and the Court of Appeals mandate recalled [Appendix D, *infra,* p. 45].

It is submitted that, under these circumstances, Petitioner's time to file application for certiorari continued to remain open.

What is customary practice is recognized to be an appropriate measure of whatever may be the duty involved. (*Commissioner* v. *Estate of Bedford,* 325 U. S. 283). The Court of Appeals Clerk had failed to perform his duty. Therefore, Petitioner should not be charged with said Clerk's omission (*Rosenbloom* v. *United States,* 355 U. S. 80; *Hill* v. *Hawes,* 320 U. S. 520). Moreover, the Court of Appeals' mandate having become disassociated from its judgment, so that it lagged behind it for almost three months, it is the issuance of the mandate which initiated the time for applying for certiorari (*Commissioner* v. *Estate of Bedford* [*supra*]; cf. *Potts* v. *Flax,* 313 F. 2nd [1963], 284, 290-291 [C A 5]).

Moreover, U.S.C. Title 28, § 2101(f) contemplates that, where mandate and judgment become disassociated, the recall of its mandate, by the Court of Appeals, may be accomplished, "to *enable* the party aggrieved to obtain a writ of certiorari from the Supreme Court". It is difficult to see how a party may be so "enable[d]" to apply for certiorari, if nevertheless, his time to apply therefor is running to expiration.

If a petition for rehearing suspends the enforcement of the Court of Appeals' mandate, and extends the time for petitioning this Court for certiorari—as is certainly the case—then, by the same standard, so does a further stay, and a recall of mandate. Each and all leave the Court of Appeals judgment intact, but stay its enforcement for any purpose, including the time for appplication to this Court for certiorari. For, otherwise, as for instance in the case of a petition for rehearing, time to apply to this Court for certiorari might well expire while the Court of Appeals is deliberating.

Questions Presented

1. Is not the Petition for certiorari timely, and, therefore, should not the application be considered on its merits?

2. Was Petitioner, who was a defendant in the underlying criminal prosecution, accorded the right guaranteed

by Amendment VI to the Constitution of the United States, that "the accused shall enjoy the right to a speedy * * * trial"; and, if not, should not the indictment have been dismissed, by reason of violation of the Fifth and Sixth Amendments, and of Rule 48 of the Federal Rules of Criminal Procedure?

3. Was Petitioner entitled to a preliminary independent inquiry as to whether his written statement, made almost five years earlier, in 1960, to a detective who had detained and threatened him, was voluntary?

4. Was it a violation of Petitioner's right not to be subjected to double jeopardy, for the Government to introduce evidence having for its purpose to establish that he was a receiver of a stolen Pontiac automobile (to prove which accusation, proof was given on the trial at bar), and of which alleged crime (predicated on New York Penal Law § 1308) he had, in 1960, been acquitted, after a trial in the County Court of Bronx County, State of New York.

The Constitutional and Statutory Provisions Involved

U. S. CODE, TITLE 28, § 2101 (f):

"(f) In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. * * *"

Constitution of the United States:

AMENDMENT V.:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty,

or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Federal Rules of Criminal Procedure:

"RULE 48. DISMISSAL.

* * * * *

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

U.S.C. TITLE 18, § 2312.

"2312. *Transportation of stolen vehicles.*—Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

U.S.C. TITLE 18, § 2.

"2. *Principals.*—(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

U.S.C. TITLE 18, § 371.

"371. *Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

U.S.C. TITLE 18, § 3282.

"3282. *Offenses not capital.*—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.".

Statement

After trial in the United States District Court of the Southern District of New York before McGohey, D.J., and a jury, Petitioner was found guilty on two counts of an indictment charging him and his co-defendant, Damsky, (1) with knowingly transporting a Stolen Lincoln automobile in interstate commerce (U. S. Code, Title 18, §§ 2312 and 2), and (2) with conspiring to commit offenses in violation of said statutes.

The crimes charged were alleged to have occurred on July 14, 1960 (Indictment, 4a-5a). The indictment was not filed until June 14, 1965—but one month short of expiration of the five-year statute of limitations (18 U.S.C. § 3282). There has never been any explanation whatsoever for the delay in procuring an indictment.

The trial occurred on April 15, 18, and 19, 1966 (Docket Entries, 1a-3a).

In the meantime, and in 1960, Petitioner had been tried and acquitted, in a New York State court, for allegedly receiving stolen property in violation of N. Y. Penal Law § 1308, with respect to a Pontiac car, of which alleged receiving, evidence was given on the trial in the case at bar.

Both defendants had originally pleaded not guilty, but at the opening of the trial, the co-defendant Damsky, who had participated in the acquisition of the car in question, and had driven it across state lines, and thus appeared to be the principal, withdrew his plea of guilty to the conspiracy count, though he persisted in his not guilty plea to the substantive count, as to which, nevertheless, he was not required to go to trial. Instead, he testified against Petitioner. On the rendition of the guilty verdict against Petitioner, the substantive count against Damsky was dismissed. On the second count charging conspiracy, the court suspended sentence, and placed Damsky on probation for a period of two years.

The court sentenced Petitioner (1) on the substantive count, to a year and a day; and (2) on the second count, for conspiracy, suspended sentence, placing Petitioner on probation for two years, probation to commence at the conclusion of the prison sentence (Docket Entries, 3a).

Petitioner appealed to the Court of Appeals on June 1, 1966. He was and is admitted to bail (Docket Entries and Notice of Appeal to the Court of Appeals, 138a).

Argument and Reasons for Allowing the Writ

In the District Court, both in advance of trial, and on the trial, appropriate motions to dismiss the indictment were made by reason of violation of the Sixth Amendment (6a ff).

As the carefully considered opinion of the Court of Appeals shows, it was and is without definitive guide lines promulgated by this Court, as to what may be deemed compliance with the requirement of the Sixth Amendment that an accused be accorded "a speedy trial". However, contrary to the course adopted by Wyatt, D.J., in the District Court—who thought it "need not be determined" "whether the Sixth Amendment 'speedy trial' provision is ever applicable to a period before indictment" (135a, *infra*, p. 42)—the Court of Appeals was willing to postulate that "it may well be that pre-arrest delay may impair the

capacity of the accused to prepare his defense, and, if so, such impairment may give rise to a due process claim under the Fifth Amendment * * * or a Sixth Amendment claim based upon the speedy trial guarantee * * *" (*infra*, p. 28 of Appendix A). However, the Court of Appeals did not go as far as did the Fourth Circuit Court of Appeals, when it said, in *U. S., etc.* v. *Harbin* ([1967] 377 F. 2nd 78): "We recognize that a constitutional question may arise where there is deliberate delay over a long period in initiating a prosecution, just as where there has been undue delay in bringing defendant to trial after prosecution has been instituted" (id., p. 79).

Accordingly, without requiring the government to explain what was on its face deliberate delay in procuring an indictment, the Court of Appeals, casting the burden on defendant, limited its inquiry to whether "there is a plausible claim of prejudice resulting from the delay in arrest" (*infra*, p. 29 of Appendix A). Thus, the Court of Appeals contemplated that it was for defendant to carry the burden of showing prejudice, as a part of the very trial in which he was struggling to prove his innocence—even at the risk of imperilling his constitutional right to remain silent and to decline to cooperate in elucidating the case for the Government. And by this standard the Government—which alone was able to make explanation of what, on its face, was inexcusable delay—was not required to make disclosure or explanation of its failure to observe the constitutional mandate.

So oriented, the Court of Appeals concluded that defendant [Petitioner] had failed to show any prejudice.

The Court of Appeals furthermore held—notwithstanding timely and appropriate request therefor—that there was no requirement that defendant [Petitioner] be accorded a preliminary independent inquiry as to whether a statement he had made to a State detective was voluntary (Govt. Ex. 13, following 139a). Though the Court was requested to hold a preliminary hearing, in order to determine whether Petitioner's rights under the Fifth and Sixth

Amendments had been violated (44a, 90a), it did not hold any hearing, and the record is devoid of any findings of fact or conclusions of law on the subject (44a-46a). Notwithstanding this Court's decision in *Jackson* v. *Denno* (378 U. S. 368), there are conflicting decisions in the various federal Courts of Appeal (see discussion, *infra*, p. 18).

Moreover, as we have seen, the Court of Appeals, in the case at bar, permitted proof, all over again, on the trial—notwithstanding defendant's acquittal in the State court—as to the Pontiac car. Accordingly, on the subject of double jeopardy, there would seem to be inconsistency between the Court of Appeals' denial of any application of the double jeopardy principle to the case at bar, and the developing concept that a federal court is but another State court, and, by that standard, must respect an adjudication made by a State court.

Thus, there are special and important reasons, within the guidelines formulated in Rule 19(b) of the Rules of this Court, which we pray should move this Court to grant certiorari.

Pervading all, the reasons which we urge are considerations of public policy—i.e., that administration of criminal justice be facilitated and guided by definitive rules, formulated by this Court.

As to the impact of the Fifth and Sixth Amendments on pre-arrest cases—as, indeed, the Court of Appeals' opinion shows—there are conflicting dicta among the various Circuits. In fact, we do not know of any clear-cut decision on the subject. As to the requirement that the circumstances under which an incriminating statement was made, must be the subject of a preliminary inquiry, it would seem that the rulings below fail to accord with this Court's views, as expressed in *Jackson* v. *Denno* (*supra*).

As to what constitutes a "speedy trial", touching the pre-arrest period, this Court has not as yet afforded a definition.

As to the preliminary hearing to determine whether a statement is voluntary, though this Court has spoken, its admonition was not followed.

As to double jeopardy, though, by the authorities to date, there was none in the case at bar, there is patent inconsistency with the concept that a federal District Court is but another State court, and the corollary which, we submit, should follow—that a judgment of acquittal of a constituent part of the federal crimes alleged, should be respected.

Unexplained substantial delay in indicting an accused, violates the Constitutional requirement that "the accused shall enjoy the right to a speedy and public trial."

It is the Government which, in the first instance, owes the duty of explanation for prolonged delay. Yet, the Government was not required to go forward with any explanation. Instead, the burden was cast upon defendant, to show prejudice as a part of his defense.

Thus reversing the appropriate course of things, the Court of Appeals concluded that defendant had failed to show prejudice, because:

(a) There were "only" "isolated instances of diminished recall" (*infra*, p. 30).

(b) Petitioner was placed on notice when one week after the alleged event, Petitioner "was placed on notice on July 21, 1960 * * * that he would be called to answer for his participation in the transaction", followed "within a few weeks by a similar visit from federal agents" (*infra*, p. 30).

(c) Petitioner's recollection, and that of his co-defendant Damsky "was facilitated by various documents in evidence * * * refreshers of recollection not available" ordinarily (*infra*, p. 30).

(d) Two prosecution witnesses "were able to testify to their personal recollection of Feinberg's complicity * * *" (*infra*, p. 30).

(e) A "formal hearing * * * could have revealed no more than did the trial record" (*infra*, p. 31).

The fact is that the record is replete with instances of diminished recall, not only of Petitioner, but also of Government witnesses. In the testimony of Damsky and Cioffi, there are at least twenty-five instances of non-recollection

(Tr., pp. 15a, 18a, 30, 32, 35, 44a, 73, 90a, 94, 95, 97 [three times], 98, 103 [two times], 111 [three times], 113, 131). Note, particularly, as to critical conversations: Tr., pp. 32, 35, 44a, 97, 131. In Feinberg's testimony, there are at least eleven instances: 53a, 54a, 56a, 65a, 67a, 68a, 72a [twice], 77a, 83a, 90a.

The following instances are particularly striking:

The defendant Damsky asserted that he knew a person by the name of Joe Worth, and that said Worth had introduced him to another individual, named Frank Giampetruzzi (29a, 30a, 13a).

The witness said that at a conversation at which defendant Feinberg was present, he, Worth and Giampetruzzi discussed the obtaining of a car. Damsky said that he suggested that he wanted a Lincoln Continental (14a, 15a). In response to questions by the Government as to what was said during this conversation by the various parties, Damsky responded, "* * * *I don't recall* * * * *It was so long ago*" (15a).

Damsky said that a person by the name of Artie Newton delivered a Lincoln Continental to the Riverdale Auto School and that title was registered in Damsky's own name (15a-17a).

In response to a question by the Government, Damsky asserted that he also knew one Joseph Cioffi (18a). He asserted that Feinberg introduced Cioffi to him, as a friend of "Frankie's". In response to further questioning concerning this meeting, Damsky answered the questions as follows (18a):

"Q. Did he say anything further at the time? A. *I don't recall.*

Q. Did Cioffi say anything to you at that time? A. *I don't recall.*

Q. Was there a conversation between you, Cioffi, and Feinberg at that time? A. *I don't recall.*

Q. Was it really an introduction? A. *I don't remember* that specific first meeting or second meeting.

Q. Was there any discussion of automobiles at that time? A. *I don't recall.*

(49) The Court: Repeat that question, please.
(Read.)
A. *I don't recall.*"

Such instances, even on the part of Government witnesses, were prejudicial to Petitioner. For what was said in the conversations, which the Government's witnesses could not remember, may well have confirmed Petitioner's testimony that he did not know that the car in question had been stolen. It was for the jury, in the first instance, to evaluate these deep silences in the Government's case. Petitioner was helpless to elucidate them. Nor, for that matter, neither could the Court of Appeals. It could only speculate.

It is no answer to these observations to say, as did the Court of Appeals, that Petitioner was put on notice when in 1960, he was first detained and interrogated by a state detective and the FBI agents (*infra*, p. 25).

It should be remembered that he had been tried in a State court, in 1961, for alleged participation in dealing with the automobiles involved herein, and had been acquitted—an experience which could have served to erase from his mind the unpleasant events which had brought him so much misfortune, and which he thought were history. The car documents in the case would not serve any useful purpose. (See opinion, *infra*, p. 30.) They did not serve as memoranda of conversations with his accusers. Said documents did not record what was said, but only the numbers, which his accusers wrote down as the automobile identifications, but without any proof, on the trial, that the identifications so reflected on paper were reproduced on the Lincoln car in question or their parts. The car had disappeared six years earlier. The initiating conversations were all-important in any inquiry into Petitioner's supposed knowledge of the underlying theft, which knowledge he denied.

That two prosecution witnesses were able to testify to their personal memories as to selected events and areas is not impressive. They had every reason to prevaricate. They were individuals who presumably bought their

release by involving Petitioner. What they said they remembered, Petitioner was unable to contradict, because he did not remember. What the witnesses said they did not remember was all-important on the critical issue of knowledge.

The final observation made by the Court of Appeals that a "formal hearing * * * could have revealed no more than did the trial record" (*infra*, p. 31) is an assumption. For, though what the record showed as to non-recollection was quite plain, what is significant is what the record could not show by reason of lack of recall on the part even of Government witnesses. A measure cannot be made of what was thus lost, without independent inquiry as to what would have been shown—as against what was shown. And that must remain a speculation.

Rights guaranteed by the Constitution should not thus be cancelled on the basis of speculation!

It is, therefore, that the Fifth and Sixth Amendments should be taken at their word—literally, i.e.,

"* * * the accused shall enjoy the *right* to a speedy and public trial * * *"

A delay of four years and eleven months, *in the absence of an explanation by the Government*, should at least, *prima facie*, be deemed a violation of that command. The burden of going forward with an explanation should be on the Government, which knows whatever the reasons may have been. It should not be devolved on Petitioner, who could not possibly be expected to give an explanation for the Government's delay, or, in the nature of things, to demonstrate the prejudice worked on him by loss of what lay solely within the knowledge of the Government and its witnesses. Who can say what Petitioner might have uncovered five years earlier?

Indefinite delay in presenting a charge to the grand jury, and in procuring an indictment, is as oppressive—indeed, more so than delay in prosecuting an indictment already found. For, as to pre-arrest delay, the prospective defendant has no remedy. Against post-arrest delay, he has

status to be heard and to invoke judicial processes to protect him. Petitioner's plight here was akin to that of the defendant in *Klopfer* v. *State of North Carolina* (386 U. S. 213), who, by taking a plea of *nolle prosequi*, was, by statute and case law, required to submit to an ever overhanging threat that years thence—indefinitely—he might find himself required to interpose a defense to an ever-threatening trial of an indictment, never barred by any statute of limitations. As the Chief Justice said, for this Court: "During that period, there is no means by which he can obtain a dismissal or have the case restored to the calendar for trial."

The fact that the statute of limitations has not run, does not affect the issue presented. Statutes of limitation bar prosecution—however diligent the Government may have been in its effort to marshal a case against defendant. Explanations will not lift the bar. The requirement that a defendant be accorded a "speedy trial", enjoins prompt expedition, both of indictment and of its prosecution. An explanation may establish that what seems like inordinate delay was rather "deliberate speed". But explanation there must be. And the duty of making explanation should rest on the Government. For, as said by the Chief Justice in *Klopfer* v. *State of North Carolina* (*supra*), "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment", and "is one of the most basic rights preserved by our Constitution". Or, as said by Mr. Justice Harlan (concurring), "to put a person under the cloud of an unliquidated criminal charge for an indeterminate period, violates the requirement of fundamental fairness assured by the Due Process clause • • •"

A case very much in point is *People* v. *Winfrey*—decided by the New York Court of Appeals (20 N Y 2nd 138). In that case, the defendant committed the alleged crimes in 1958. A warrant was issued for his arrest, but was not executed. Almost five years later, in 1963, he was indicted in New York. [This matches the fact, in the case at bar, that defendant was, in 1960, detained by a State detective and FBI agents; was thereafter in 1961 tried in a New

York State court, was acquitted, and released, and then indicted by a federal grand jury almost five years later]. In the meantime, Winfrey was incarcerated, for other alleged derelictions, in Alabama. His return to New York was not asked. The New York Court of Appeals held that four and half years' delay in prosecuting the indictment, deprived the defendant of due process of law. The court observed that, though "the People are always free on a motion of this kind to show reasons why the prosecution was not advanced * * *", it had not carried that burden.

Moreover, the purpose of criminal prosecution and correction is to protect the public, and at the same time to start the process of rehabilitation for the criminal. *A fortori*, in the case at bar, it appearing that Petitioner had been tried and acquitted with respect to one of the principal transactions involved in the present two-count indictment, i.e., touching the Pontiac car—and had not again transgressed, the agonies imposed on Petitioner's wife and two daughters, as well as upon himself, and his ability to support himself and his family, should not have been reactivated to defeat the process of rehabilitation. We cannot conceive of any prejudice more serious than that.

The least that Petitioner was entitled to have, if the Fifth and Sixth Amendments were not to be honored in their breach, was to require the Government to go forward with an explanation for its delay, so that the Court could judge for itself whether that delay was unreasonable.

There should have been a preliminary independent inquiry into whether Petitioner's statement was voluntary.

It does not follow that the rules of *Escobedo* and *Miranda*, which were made routine for all subsequent cases, do not find application in cases tried before their effective dates to the extent that the facts justify the conclusion that the statement was not voluntary.

As said in *Wan* v. *U. S.* (266 U. S. 1), quoted in *Miranda*, 384 U. S. 436, 462:

"In the Federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession

was not induced by a promise or threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made." (p. 14-15)

So also, it was said in *Miranda*, referring to Rule 5(a) of the Federal Rules of Criminal Procedure:

"These supervisory rules, requiring production of an arrested person before a commissioner (without unnecessary delay) and excluding evidence obtained in default of that statutory obligation * * *"

are "responsive" to "considerations of Fifth Amendment policy" (p. 463).

Referring to the rules as to representation by counsel in trials, and to the taking of statements *in camera*, this Court said in *Johnson* v. *New Jersey* (384 U. S. 719):

"In each instance, we concluded that retroactive application was justified because the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent' * * *" (pp. 727-8)

In conclusion, this Court said:

"Thus, while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the non-retroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards, as part of an involuntariness claim." (p. 73)

"Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test." (p. 732)

In the case at bar, Petitioner was faced with the threat of prosecution; he was isolated, and for several hours interrogated (77a-87a). The psychological effect was that recognized and appreciated in *Escobedo* and *Miranda*. Those cases did not create a new grievance of what was always recognized to be offensive to our system of justice. Yet, on the trial, Petitioner was not permitted to narrate what he had said (91a; see, also, 72a), though he had altogether forgotten the statement he had been psychologically

coerced into signing. He was thus held to what he had written, without opportunity to explain. This was prejudicial error of law (*Jackson* v. *Denno*, 378 U. S. 368).

The purpose of the rule requiring the judge to conduct an independent investigation—out of the hearing of the jury—as to the voluntariness of the alleged statement, was to avoid prejudice to a defendant, which would result were he to make his narration in the presence of the jury. His right not to testify against himself was respected and protected. It was immaterial to inquire whether his statement was false or true. Here, there was no such preliminary inquiry. Instead, without inquiring into his police interrogation, what Petitioner said on the trial was deemed to make unnecessary the protection of his constitutional rights. Ignoring psychological coercions, the Court of Appeals ruled that as long as defendant was not beaten up, his statements were voluntary. The fact that he took the stand was held to be a waiver. Indeed, as ruled in the Court of Appeals' opinion, on that illegal basis the trial judge's instruction to the jury—that Petitioner's statement had been voluntary—without preliminary inquiry prior to trial, was deemed a compliance with the law, and the jury thus, in effect, told that it must find that the statement was voluntary because the judge, on what he had learned only from the trial, thought that defendant's lack of memory was "feigned" (Court of Appeals' opinion [*infra*, pp. 31, 36, 38] and 119a).

The error thus committed by the Court of Appeals in this case, is being repeated, in one aspect or another, in other Circuits. The conflict in the Circuits, arising from failure to apply *Jackson* v. *Denno* [*supra*], decided by this Court, and, in accordance therewith to require that a preliminary hearing be held as to whether a statement was voluntary, is reflected in *Woody* v. *United States* (379 F. 2nd [CA, D. C.] 130), in which the District of Columbia Court of Appeals said that it would not follow the rule formulated by the Fourth Circuit in *United States* v. *Inman* (352 F. 2nd [CA 4] 954), i.e., that the fact that there was contradiction in defendant's testimony as to whether his pretrial statement

had been voluntary, did not dispense with the necessity of holding such independent hearing.

The admission of testimony as to the Pontiac car, as to which Petitioner had been acquitted, subjected Petitioner to double jeopardy.

In its opinion, the Court of Appeals justified admission of said testimony on the ground that the prior prosecution having been brought by a different sovereign, there was no double jeopardy; moreover, that since it was not plain that the issues were the same, there was no collateral estoppel.

We submit that the issue may not thus be resolved dialectically. Today, in civil cases, it is settled that the federal courts are but additional state courts. Why not so also in criminal cases in which State prosecutions have preceded? The "sovereign" theory has had its vicissitudes (*Abbate* v. *U. S.*, 395 U. S. 187; particularly, the separate opinion of Mr. Justice Brennan; also *U. S.* v. *Ewell*, 383 U. S. 116). So also as to our concepts of collateral estoppel, which no longer require identity of parties. (See also in the *Abbate* case the discussion of *Blockburger* v. *U. S.*, 284 U. S. 299.) Compare, also, *U. S.* v. *Sells* (325 F 2d 161), decided by the Second Circuit Court of Appeals, and its discussion of *U. S.* v. *Maybury* (274 F 2d 899), also decided by that Court, in which theoretical concepts were not permitted to obscure or frustrate factual reality. In the *Maybury* case, as the Court of Appeals put it in the *Sells* case:

> "This court held * * * that a conviction of uttering with knowledge of the forged signature was factually inconsistent with acquittal of forgery."

So in the case at bar, dismissal of the substantive count as against Damsky, though he confessed his guilt, and had alone been the driver of the Lincoln car, which crossed State lines, and pleaded guilty to the conspiracy count, is incapable of reconciliation with the facts claimed to have been proved. Such a conflict passes arbitrary rules permitting inconsistent verdicts, and multiple convictions

and sentences for what are only technically different crimes. Here, Petitioner, who had been acquitted of wrongdoing as to the Pontiac car was convicted on overlapping counts, including alleged receiving of the Pontiac car. Indeed, Cioffi's many convictions for car theft were permitted to satisfy the jury that his theft of cars other than here involved, established that Petitioner knew that the one in question had been stolen.

Conclusion

Adopting the phraseology of the Chief Justice, in the recent case of *Will* v. *United States* (decided November 13, 1967, and not yet published), there are "wide implications of the decision below for the orderly administration of criminal justice in the federal courts". For it is all-important that there be "an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense."

For the foregoing reasons, Petitioner prays that a writ of certiorari be granted.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Counsel for Petitioner.

Appendix A.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 186—September Term, 1966.

(Argued November 18, 1966 Decided July 31, 1967.)

Docket No. 30739

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARVIN FEINBERG,

Appellant.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appellant and a codefendant, Arthur Damsky, were charged in the United States District Court for the Southern District of New York in a two-count indictment filed June 4, 1965 with knowingly transporting a stolen motor vehicle, a 1960 Lincoln Continental, in interstate and foreign commerce on or about July 14, 1960, in violation of 18 U. S. C. § 2312 and 18 U. S. C. § 2; and with conspiring so to do. On April 15, 1966 Damsky pled guilty to the conspiracy count and trial proceeded against appellant, Damsky testifying for the Government, before Judge McGohey and a jury. On April 19, 1966 appellant was found guilty on both counts. He appeals his conviction claiming his constitutional rights were violated because of

the lapse of time between the date of the alleged offense and the dates of indictment, arrest and trial; because of the admission into evidence of a written statement given by him to a New York City detective on July 21, 1960 which contained information inconsistent with his testimony at trial; and because of other alleged trial errors. Conviction affirmed.

EZRA H. FRIEDMAN, OTTO G. OBERMAIER, Assistant United States Attorneys, Robert M. Morgenthau, United States Attorney, Southern District of New York, *for Appellee.*

IRVING ANOLIK, HYMAN BRAVIN, New York City, *for Appellant.*

WATERMAN, *Circuit Judge:*

This is an appeal from a judgment of conviction on a jury verdict in the United States District Court for the Southern District of New York. On June 1, 1966 appellant Feinberg was convicted on two counts, the first that of knowingly transporting a stolen motor vehicle in interstate commerce in violation of 18 U. S. C. § 2312, 18 U. S. C. § 2, and the second that of conspiring to commit the substantive offense, in violation of 18 U. S. C. § 371. Appellant was sentenced to imprisonment of one year and one day on the first count and to two years probation on the second count, but remains free on bail pending the determination of this appeal.

The government case established that Feinberg and his codefendant Damsky, who pleaded guilty to the conspiracy count and testified at the trial as a government witness,

were joint owners of the Riverdale Auto School and Riverdale Auto Rental, Inc., located in Bronx County, New York. Early in January 1960 they were introduced to one Frank Giampetruzzi who claimed he could provide cars for their businesses for $1000 to $1200 each because there had been a "mix-up" in serial numbers at the automobile manufacturers' plants in Detroit. Damsky expressed interest and requested Giampetruzzi to supply them with a 1960 Lincoln Continental convertible.

During the night of January 17, 1960 such an automobile was stolen from its rightful owner who had purchased it for $5800 shortly before the theft. The next morning the car was delivered to Damsky and Feinberg by one John Newton. Feinberg prepared a bill of sale warranting the Lincoln's title free of liens and accident claims. Damsky and Newton then took this bill of sale to a nearby notary before whom Newton executed it. Damsky then registered the car in his own name, insured it and secured a $1500 personal bank loan on it, the proceeds of which were given to Feinberg. On April 22 the title to the Lincoln was transferred to the auto rental company which assumed the bank loan and paid the insurance premiums on the car. Damsky testified that they paid Giampetruzzi $1000 to $1200 for it.

A witness named Cioffi testified for the Government that he introduced himself to Feinberg as a friend of Giampetruzzi and represented himself as being in the same "business" as Giampetruzzi. He offered to supply stolen cars to appellant for $1000 each if appellant would obtain blank registration forms with counterfeit validation stamps. He testified that Feinberg did furnish 7 to 10 such forms for him by depositing them in a post office box whose combination Feinberg communicated to Cioffi, and he also testified, over objection, that after he received the

counterfeit registration forms he stole and delivered to Feinberg, during April 1960, a 1959 Pontiac Bonneville convertible for the price of $100.

Cioffi and codefendant Damsky also implicated Feinberg in three additional stolen car transactions during the same period involving two 1960 Thunderbirds and a 1959 Cadillac.

In July 1960 Damsky had a document prepared by an attorney authorizing Damsky to drive the Lincoln. Feinberg executed the document in his corporate capacity. On July 14th Damsky and his wife left New York in the Lincoln and drove to Mexico City for the dual purpose of vacationing and of selling the car. He was arrested there by Mexican authorities for possession of a stolen car and was returned to FBI agents in Texas on July 25, 1960.

Appellant Feinberg testified in his own behalf. He denied any complicity in the purchase or sale of any stolen automobiles. He claimed that the price paid for the 1960 Lincoln had been $5700, not $1000 or $1200. He testified that he had purchased the 1959 Pontiac Bonneville for a fair price of $2500 or $2700. He denied participation in the three additional stolen car transactions testified to by Cioffi and Damsky and denied furnishing counterfeit registration blanks to Cioffi.

On cross-examination Feinberg was confronted with his signed handwritten statement of July 21, 1960, see fn. 7 *infra* which he admitted that he had made to Detective Charles Francis of the New York City Police Department and which was inconsistent with portions of his trial testimony.

On July 21, 1960, four days before Damsky had been returned from Mexico, Detective Francis, a New York City detective, went to Feinberg's office and questioned him

about the 1960 Lincoln and about the 1959 Pontiac. After being told he would be taken to headquarters "in the cuffs" Feinberg agreed to accompany Francis to the detective's office at police headquarters. On the way they first stopped at Feinberg's home to tell Mrs. Feinberg to take charge at the office, and then half-way to headquarters they stopped at a diner for coffee and cake. Arriving at headquarters the questioning continued, Francis informing Feinberg that Damsky had been arrested in Mexico and that the FBI was interested in the case. Francis did not inform Feinberg that he had a right to an attorney or to remain silent, but the record gives no indication that Feinberg was coerced in any way or subjected to tough detention-room tactics other than Feinberg's conclusory generalized statement that while he was with Francis "there was an awful lot of talking and brow-beating and threats . . . ." When requested to specify what he meant by stating that what was said or done constituted a threat, he replied, "Well, by no stretch of the imagination do I want to give the impression that it was a physical threat" but he meant that there had been "a lot of repetition." Within three hours after he had arrived at Francis's office, Feinberg prepared and executed a written statement regarding his participation in the Pontiac transaction, and later on wrote out and executed another, the one relative to his involvement with the 1960 Lincoln. Feinberg left police headquarters in custody, under arrest on a state charge for criminally receiving the Pontiac. He was admitted to bail the next morning, and a week later he was further questioned at his office by two FBI agents about the 1960 Lincoln transaction. He was indicted by New York for having criminally received the 1959 Pontiac, on October 3, 1961 was tried in Bronx County Court by the court sitting without jury, and was acquitted of the charge.

On June 14, 1965 the federal indictment in the present case was filed and after a three day trial Feinberg was convicted—as stated above—on June 1, 1966.

Appellant contends upon this appeal that the delay between offense and prosecution violated his right to due process and a speedy trial guaranteed by the Fifth and Sixth Amendments respectively, thus requiring the trial judge to dismiss the indictment, or, at least, requiring the holding of a preliminary hearing to investigate the reason for the delay so as to ascertain the resulting prejudice, if any, the delay caused appellant. He also claims that the statement which he gave to the state authorities was made under such compromising circumstances as to require the trial judge either to exclude it from evidence or at least to hold a preliminary hearing to determine whether the statement had been voluntarily made. In addition, he maintains that the admission into evidence of testimony relating to an offense for which he had been previously tried and acquitted by state authorities subjected him to double jeopardy in violation of the Fifth Amendment and contravened the principle of collateral estoppel. Finally, appellant questions the propriety of the trial court's charge to the jury and the sufficiency of the evidence to support his conviction. We have thoroughly examined all of these contentions and conclude that none of them require a reversal of the judgment below.

1. *The Pre-Prosecution Delay*

The offense of which appellant has been convicted of having committed was consummated between July 14 and July 22, 1960—the period in which Damsky drove the Lincoln Continental to Mexico. Appellant, however, was not indicted until June 14, 1965, some four years and eleven

months after the offense and only one month before the expiration of the applicable statute of limitations. (18 U. S. C. § 3282). Where there has been a pre-arrest delay the statute of limitations is "usually considered the primary guarantee against bringing overly stale criminal charges," *United States* v. *Ewell*, 383 U. S. 116, 122 (1966). Pre-arrest delay is usually free of the sometimes damaging effects of excessive post-arrest delay[1] for until he has been arrested one has not been deprived of his freedom or been publicly accused. Moreover, there may be valid justification for a pre-arrest delay. Time-consuming investigation prior to an arrest minimizes the likelihood of accusing innocent parties and may facilitate the exposure of additional guilty persons. Once probable cause is established and an indictment filed, however, these justifications are of decreasing importance; the accusation has already been made, the prosecution has gathered at least a modicum of evidence, and news of the arrest will cause other implicated parties to take cover.[2] Also, at this point, the protection afforded by the statute of limitations expires because the statute of limitations only applies to a delay between the commission of the crime and the filing of the indictment. For these reasons a number of courts have held the constitutional shelter of the Sixth Amendment available only to those affected by post-arrest delay. See,

[1] As was said in *United States* v. *Ewell*, *supra* at 120, the Sixth Amendment guarantee "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself."

[2] The familiar example is found in narcotics investigations where the efficacy of an undercover agent or informant to penetrate the network of illicit distribution ceases when he publicly appears as complainant. See, e.g., *United States* v. *Simmons*, 338 F. 2d 804 (2 Cir. 1964), cert. denied, 380 U. S. 983 (1965).

e.g., *Nickens* v. *United States*, 323 F. 2d 808 (D. C. Cir. 1963); *Harlow* v. *United States*, 301 F. 2d 361 (5 Cir.), *cert. denied*, 371 U. S. 814 (1962); *Parker* v. *United States*, 252 F. 2d 680 (6 Cir.), *cert. denied*, 356 U. S. 964 (1958); *Foley* v. *United States*, 290 F. 2d 562 (8 Cir.), *cert. denied*, 368 U. S. 888 (1961); *Venus* v. *United States*, 287 F. 2d 304 (9 Cir. 1960), *rev'd on other grounds*, 368 U. S. 345 (1961). But see *United States* v. *Dickerson*, 347 F. 2d 783, 784 (2 Cir. 1965); *United States* v. *Simmons*, 338 F. 2d 804, 806 (2 Cir. 1964), *cert. denied*, 380 U. S. 983 (1965).

Appellant argues that we must presume that he has been prejudiced by the four year and eleven month pre-arrest delay between event and indictment. But the only lapse of time prior to arrest[3] which will activate such a presumption is that established by the statute of limitations. Indeed, some courts have said that the statute controls irrespective of whether there has been demonstrable prejudice. See, e.g., *Bruce* v. *United States*, 351 F. 2d 318, 320 320 (5 Cir. 1965), *cert. denied*, 384 U. S. 921 (1966); *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (6 Cir. 1959); *Harlow* v. *United States*, *supra* at 366. In any case, it is clear that mere delay in arrest does not of itself amount to a constitutional violation. *United States* v. *Simmons*, *supra* at 806.

Though prejudice is not to be presumed, it may well be that pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment, see *Powell* v. *United States*, 352 F. 2d 705, 707 (D. C. Cir. 1965), or a Sixth Amendment claim based upon the

---

[3] Though there may be a presumption of prejudice where there has been shown to have been an excessive *post*-arrest delay. *United States* v. *Lustman*, 280 F. 2d 475, 478 (2 Cir.), cert. denied, 358 U. S. 880 (1958).

speedy trial guarantee, see *United States* v. *Simmons*, *supra* at 806; *United States* v. *Dickerson*, *supra* at 784. See also *Chapman* v. *United States*, (2 Cir. Apr. 21, 1967), slip sheets 2015, 2017. For this reason we must inquire whether there is a plausible claim of prejudice resulting from the delay in arrest. See *Jackson* v. *United States*, 351 F. 2d 821, 823 (D. C. Cir. 1965). Such a claim may arise if a key defense witness or valuable evidence is lost, see *Petition of Provoo*, 17 F. R. D. 183, 203 (D. Md.), *aff'd per curiam*, 350 U. S. 857 (1955), if the defendant is unable credibly to reconstruct the events of the day of the offense, see *Jackson* v. *United States*, *supra* at 823, or if the personal recollections of the government or defense witnesses are impaired, *Ross* v. *United States*, 349 F. 2d 210, 213-14 (D. C. Cir. 1965), because if any of these events occur the reliability of the proceedings for the purpose of determining guilt becomes suspect.

In *Ross* the District of Columbia Circuit reversed a narcotics conviction though the pre-arrest delay was only seven months, because the accused was an uneducated, unemployed man without notice of the offense and with little ability or reason to recall the events of the day of the alleged offense; defendant's alibi witness was similarly unable to recall; and the sole prosecution witness testified, not from personal recollection, but only with the aid of his official notebook, the sole means of identification and prosecution of dozens of alleged narcotics offenders.[4] See also

---

[4] In *Ross* the court stated, *supra* at 216: "Without attempting to define the precise reach of the Fifth Amendment in this context, a due regard for our supervisory responsibility for criminal proceedings in this jurisdiction requires, in our view, the reversal of this conviction." Therefore, when in *United States* v. *Sanchez*, 361 F. 2d 824, 825 (2 Cir. 1966) we discussed *Ross* we considered that the result reached there was, at least in part, the exercise of the District of Columbia's supervisory power over the Metropolitan (D. C.) police force.

Woody v. *United States*, 370 F. 2d 214 (D. C. Cir. 1966), *Godfrey* v. *United States*, 358 F. 2d 850 (D. C. Cir. 1966), decided on the authority of *Ross*. By contrast, in the instant case, Feinberg, though given every opportunity to demonstrate prejudice, was able only to point to isolated instances of diminished recall, notably when confronted with his prior inconsistent statements to state authorities; none of these instances dealt with essential matters in dispute. He, an educated, middle-aged businessman, was able to testify with specificity as to the events in question and unequivocally to deny his complicity in the criminal transaction. The extent of any damage appellant might have suffered through the delay here is mitigated by the fact that defendant was placed on notice on July 21, 1960, one week after the completion of the offense, by a state official, during the course of the interview which resulted in appellant's formal statement, that he would be called to answer for his participation in the transaction; and this interview was followed within a few weeks by a similar visit from federal agents. Moreover recollection by appellant and Damsky of the transaction here involved was facilitated by various documents in evidence, i.e., the bill of sale, registration certificate, bank loan application, etc., refreshers of recollection not available in customary narcotics transactions. We note, finally, that here two prosecution witnesses were able to testify to their personal recollections of Feinberg's complicity; their lapses of memory were minor and related to non-essential details; in any event, as they were government witnesses, even these lapses, if their credibility were affected thereby, would prejudice the Government rather than Feinberg. True, while requiring the accused affirmatively to demonstrate prejudice, we must be watchfully aware of holding that the accused does not affirmatively demonstrate prejudice when

"His failure of memory and his inability to reconstruct what he did not remember virtually precluded his showing in what respects his defense might have been more successful if the delay had been shorter." *United States* v. *Ross, supra* at 215. Such a handicap will usually be disclosed by a careful scrutiny of the record, and certainly the record discloses none here.

We need not consider whether it was advisable for the trial judge to have denied appellant's request for a preliminary hearing on the issue of prejudice, for, as the Government suggests, a formal hearing in this case could have revealed no more than did the trial record. Where, unlike here, a substantiation of a claim of prejudice involves additional witnesses whose testimony would be irrelevant to the issue of guilt and would tend only to confuse or prejudice the jury trying that issue, a hearing in the jury's absence may be in order. This case presents no such problem.

Inasmuch as we have observed that there is an absence of prejudice shown by this record, the remaining issue for our resolution is whether a delay in arrest, however unjustifiable or unnecessary, is sufficient to invalidate a con-

---

[5] There were but three trial days, though a weekend intervened between the first and second days. Feinberg took the stand on Friday, and testified throughout Monday and into Tuesday. It was not until confronted—during cross-examination on Monday—with his July 21, 1960 statement that he indicated a failure to remember any circumstances that were in any way material. A study of the record discloses that the jury could well believe this failure at this time to have been feigned, for on redirect examination Feinberg detailed precisely all the events of July 21 and of the following morning, July 22, beginning with Detective Francis's call at Feinberg's office in the afternoon, his lodgement in a New York City lockup that evening, his appearance in court to answer to the state charge the following morning and the prompt obtaining of bail thereon. Even one of faulty memory, who had never before spent a night in a lockup, would be more apt to recall the events surrounding that incarceration than to recall other events not so spectacularly unique in his experience.

viction where the defendant has not shown that he was prejudiced by the delay. We hold that it is not, for "The Constitution and Fed. R. Crim. P. 48(b) protect only against *unreasonable and unnecessary* delay . . . ." (Emphasis added.) *United States* v. *Simmons, supra* at 806; see *Powell* v. *United States*, 352 F. 2d 705, 708 (D. C. Cir. 1965). No case has been found holding a deliberate, unnecessary pre-arrest delay sufficient basis for reversal unless it also became unreasonable and oppressive by reason of prejudice to the accused. The language in *Pollard* v. *United States*, 352 U. S. 354, 361-62 (1957) and *Petition of Provoo*, 17 F. R. D. 183, 203 (D. Md.), *aff'd per curiam*, 350 U. S. 857 (1955), referred to by appellant, must be read in the context of post-arrest delay problems which, as we have already indicated, involve greater dangers to defendants. Nor is our recent *per curiam* decision in *United States* v. *Sanchez, supra*, to the contrary. Although that opinion contains dicta which might be construed as supporting appellant's position, we affirmed the refusal of the trial court to permit inquiry into the reason for a delay of thirteen and one half months in arresting a narcotics offender because "No semblance of a showing of prejudice was made . . .". 361 F. 2d at 825. So, too, there is similar language in *Chapman* v. *United States*, 376 F. 2d 705, 707, which must be read in light of the holding there that a claim that a pre-arrest delay reached prejudicial constitutional proportions must be raised at the commencement of a trial because both parties are then in the best position to litigate the question of prejudice. 376 F. 2d 705, 707.

It would be unwise to impose upon the judiciary the inquisitorial function of scrutinizing the internal operations of law enforcement agencies when no possible prejudice to the accused has been shown. Acceptance of the proposi-

tion advanced by appellant would encourage hasty, less efficient investigation and premature deprivations of freedom, curtail the investigation of organized crime, and lodge with enforcement agents the procedural onus of recording in detail every event in the investigative process. In short, fear of forfeiting a prosecution would frequently induce *unreasonable* speed which "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Ewell*, 383 U. S. 116, 120 (1965).[6]

II. *The Admissibility of Appellant's Statement*

We now turn to the question of the admissibility of the handwritten statement[7] given by appellant to Detective

---

[6] Inasmuch as here the absence of prejudice is established we need not specifically determine when, if ever, a prosecution must fail if the defendant establishes prejudice, and the Government establishes that the delay was justified by the exigencies of the enforcement process.

[7] The statement, Government Exhibit 13, reads as follows:

7/21/60

My Partner knew this fellow from the 92 St YMCA. He had played ball with him & worked out with him quite often. Upon getting a lift from the owner of the Lincoln one nite they discussed the buying & selling of cars. My partner proclaimed interest in the Lincoln. About a month later this fellow agreed to sell it. He wanted a price that (after checking) approached wholesale figures. My partner brought him up to see me. We tried the car out & it seemed to run beautiful.

We dickered a little on price & then we bought the car after about a week. The large sum involved cautioned me to have more than just a registration. I arranged to have a sort of notarized bill of sale exchanged. I did not know of any other precautions to take as this is not a title state.

Before buying the car we took a $2,000 mortgage on the car with a bank using the motor numbers. The reason that we tried to sell the car in Mexico is because my partner wanted to

Francis, a state investigative officer. Appellant contends that his July 21, 1960 statement regarding the Lincoln transaction was made involuntarily as he was not informed in any way of his constitutional rights prior to making the statement. Conceding the inapplicability of the guidelines established in *Miranda* v. *Arizona,* 384 U. S. 436 (1966), to cases tried before the date of that decision, *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), appellant argues that *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) compels the exclusion of his statement. Since the present case was tried after June 22, 1964, the standards set forth in *Escobedo* are clearly applicable. *Johnson* v. *New Jersey, supra.* We must, then, determine the effect of those standards.

In *Escobedo,* the Supreme Court held that where

> . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, . . . no statement elicited by the police during the interrogation may be used against him at a criminal trial. 378 U. S. at 490-91.

The Supreme Court has not only settled the broad implications of *Escobedo* in its discussion in *Miranda* v. *Arizona, supra,* but it would seem has also directed us to

---

take a combination vacation & business trip. The car as my bills will readily attest was a definate [sic] lemon. Total price price [sic] of car was $5,700.

The above statement was written by me volountarily [sic].

/s/ MARVIN FEINBERG

apply the precise narrow holding of *Escobedo*, quoted above, to persons tried, as was appellant Feinberg, during the two-year period after the *Escobedo* decision and before the decision in *Miranda* on June 13, 1966. In *Johnson* v. *New Jersey*, 384 U. S. 719, 733-34 (1966), the Court indicated that uniformity of application of constitutional standards necessitated the guidelines laid down in *Miranda* to cover situations not presented by *Escobedo*.[8]

Accordingly, we apply the precise holding of *Escobedo* here, and, in applying that precise holding, we note initially that Feinberg did not request counsel, hence he was not denied "'the Assistance of Counsel' in violation of the Sixth Amendment. . . ." *Escobedo* v. *United States*, *supra* at 491. Since the requirement that there be an explicit admonition as to the constitutional rights of an accused in order to effect a waiver thereof,—see *Miranda*, *supra* at 467-69,—did not exist until *Miranda*, see *Davis* v. *North Carolina*, 384 U. S. 737, 740 (1966),[9] the instant failure to warn is not fatal to an affirmance of the conviction. By traditional standards, Feinberg's statement was totally voluntary, thus precluding a Fifth Amendment claim, see *Cicenia* v. *Lagay*, 357 U. S. 504 (1958). Therefore we hold

[8] The Court stated:

> As for the standards laid down one week ago in *Miranda*, if we were persuaded that they had been fully anticipated by the holding in *Escobedo*, we would measure their prospectivity from the same date. Defendants still to be tried at that time would be entitled to strict observance of constitutional doctrines clearly foreshadowed. The disagreements among other courts concerning the implications of *Escobedo*, however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in *Miranda*, and these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1966. Johnson v. New Jersey, 384 U. S. 719, 734 (1966).

[9] The Court observed in *Davis* that since *Miranda* was to be applied prospectively only, ". . . the present case may not be reversed solely on the ground that warnings were not given and waiver not shown." 384 U. S. at 740.

that there is no constitutional infirmity preventing government exhibit 13 from being admitted into evidence after it had been handed to and had been identified by the appellant during the Government's cross-examination of him.

Appellant also complains that the trial judge failed to comply with *Jackson* v. *Denno,* 378 U. S. 368 (1964) when he denied a request for a preliminary hearing to be held outside the presence of the jury on the question of the voluntariness of the statement. Here, the statement in question was admitted over objection during the cross-examination of appellant who had testified in his own defense. The trial judge refused to hold a preliminary hearing but did permit defense counsel on redirect in the presence of the jury fully to develop the circumstances under which appellant made the statement. Appellant's testimony in this particular was uncontradicted and, contrary to appellant's assertion made to us on appeal, the trial judge indicated for the record prior to submission of the case to the jury that appellant made the statement "voluntarily and free of coercion." See trial minutes pp. 382-383, Record pp. 447-48.

Jackson v. *Denno* sets forth that due process requires that there first must be a reliable determination of any disputed facts regarding the voluntariness of a statement by the accused and that this determination must be unaffected by the truth of the statement or the guilt of the accused. 378 U. S. at 387. For this reason, the jury must not be left to resolve factual disputes affected by the content of the statement until the trial judge, another judge, or another jury, *Jackson* v. *Denno, supra* at 391, n. 19, has initially found the statement to have been made voluntarily. 378 U. S. at 387. Additional purposes served by such a preliminary hearing are those of granting the defendant an opportunity to testify in respect of his state-

ment without being compelled to take the stand in his defense, see *United States* v. *Carignan*, 342 U. S. 36 (1951), and of permitting appellate review of the determination as to voluntariness, see *Boles* v. *Stevenson*, 379 U. S. 43, 45 (1964).

We have no doubt that the mandate of *Jackson* is applicable to the federal courts as a component of Fifth Amendment due process. *Berman* v. *United States*, 378 U. S. 530, 532 (1964) (Black, J., dissenting); *Hutcherson* v. *United States*, 351 F. 2d 748, 753 (D. C. Cir. 1965). It is certainly the better practice[10] for "the factual bases of a voluntariness objection . . . to be first explored out of the presence of the jury, with opportunity to both sides to give their versions, unless it is clear that the objection is wholly frivolous." *Luck* v. *United States*, 348 F. 2d 763, 766 (D. C. Cir. 1965).[11] Here the trial judge ran the risk

[10] The preliminary hearing was an approved practice in this circuit even before *Jackson*. See, e.g., *United States* v. *Aviles*, 274 F. 2d 179, 192, cert. denied, 362 U. S. 974 (1960); *United States* v. *Gottfried*, 165 F. 2d 360, 367, cert. denied, 333 U. S. 860 (1948). After *Jackson* was decided the Fourth Circuit instructed its trial courts that, in cases where the voluntariness of a defendant's statement is questioned, a preliminary hearing should be held away from the presence of the jury so that the accused can testify and be cross-examined solely with reference to whether his statement was coerced. The trial court should then make explicit findings of fact and, if it is determined that the statement was voluntary beyond a reasonable doubt, the statement should be submitted to the jury together with a repetition of the relevant testimony concerning the claimed coercion, the jury to be instructed that they are not to consider the contents of the statement as bearing upon the issue of defendant's guilt unless they find the statement to have been a voluntary one beyond a reasonable doubt. *United States* v. *Inman*, 352 F. 2d 954, 956 (1965). This is essentially the same procedure adopted for the courts of New York by the New York Court of Appeals in *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179, 255 N.Y.S. 2d 838 (1965).

[11] A claim cannot be found frivolous by briefly questioning the interrogating officers prior to hearing defendant's version. *Luck* v. *United States*, 348 F. 2d 763, 765-66 n. 2 (D. C. Cir. 1965).

of reversible error by permitting the statement to be read to the jury prior to any exploration of the surrounding circumstances. See *Toosigah* v. *United States*, 137 F. 2d 713, 716 (10 Cir. 1943). If appellant's subsequent testimony had indicated a credible possibility that his written statement, footnote 7 *supra*, had been unconstitutionally coerced, it would seem that a declaration of a mistrial would have been required in order to avoid the injustice denounced by *Jackson*.

In the present case, however, no harm resulted to Feinberg by reason of the trial judge's failure to hold a preliminary hearing or to make specific findings as to voluntariness. Appellant had the benefit of a full factual hearing on his claim of involuntariness without prejudice to his privilege to refuse to testify before the jury in his own behalf because he had independently chosen to take the stand. Had a formal hearing outside the presence of the jury been held, the undisputed facts gleaned from appellant's testimony would have necessitated a finding by the trial judge of voluntariness and a submission of the statement to the jury. Unlike *Jackson*, the essential facts are here undisputed, and the trial judge could find voluntariness as a matter of law, *Butler* v. *United States*, 350 F. 2d 788, 789 n. 1 (D. C. Cir. 1965), *cert. denied*, sub nom. *Greenwell* v. *United States*, 384 U. S. 992 (1966). Moreover, unlike *Boles* v. *Stevenson*, 379 U. S. 43 (1964), and see *Curtis* v. *United States*, 349 F. 2d 718 (D. C. Cir. 1965); *Green* v. *United States*, 351 F. 2d 198 (D. C. Cir. 1965), the independent judicial determination and findings prerequisite to effective appellate review are here "clearly

---

Following *United States* v. *Carignan*, 342 U. S. 36 (1951), it would seem essential that an accused have an opportunity to recite the relevant facts, outside the presence of the jury, before the trial judge dismisses his claim as frivolous.

evident" or "ascertainable" from the record. See *Jackson* v. *Denno*, 378 U. S. 368, 378-79 (1964). Nor does it appear that the trial judge in determining the voluntary nature of the statement was excessively influenced by its truth, as in *Hutcherson* v. *United States, supra*, or by a desire to avoid a mistrial, see *Luck* v. *United States, supra* at 765-66, for here the undisputed facts clearly demonstrate voluntariness.

It is apparent that no end of justice would be served by a slavish adherence to the rule requiring a preliminary hearing. See *Toosigah* v. *United States, supra* at 716; *Williams* v. *Anderson*, 362 F. 2d 1011 (3 Cir. 1966). If the rule required us to remand, appellant would be entitled first upon remand not to a new trial but only to an "independent judicial determination" on the issue of voluntariness, *Jackson* v. *Denno, supra* at 394 (1964) and this determination he has already received. Thus we find no reversible error in the admission of the statement into evidence, or in the procedure the trial court adopted in testing and determining its admissibility.

III. *The Admissibility of Cioffi's Testimony*

At trial Joseph Cioffi testified concerning appellant's participation in the purchase and registration of a stolen Pontiac in April 1960. This testimony was introduced to prove that appellant had guilty knowledge as to the source of the Lincoln prior to its interstate transportation in July 1960. Appellant, as we have noted previously, had been acquitted in a New York state court of a charge that he had criminally received that Pontiac, and he argues that the introduction of this testimony subjects him to double jeopardy, or, alternatively, that the testimony relates to an issue which was determined at the state court trial and

the Government is collaterally estopped from presenting it here.

The first branch of this argument may be summarily dismissed by noting that neither of the essential elements of a plea of double jeopardy, *i.e.*, an identity of successive sovereigns, *Abbate* v. *United States*, 359 U. S. 187 (1959); *United States* v. *Wapnick*, 315 F. 2d 96 (2 Cir. 1963), *cert. denied*, 374 U. S. 829 (1965), and an identity of alleged offenses, 2 *Wharton's Criminal Evidence*, §§ 650, n. 20 (1966 Supp.), 653; *Williams* v. *United States*, 179 F. 2d 644, 649 (5 Cir. 1950); *United States* v. *Kramer*, 289 F. 2d 909, 913 (2 Cir. 1961), are present here. A former acquittal upon one charge is no bar to the presentation in a subsequent prosecution for a different offense of facts relevant to prove that the defendant committed the latter offense. *Pilcher* v. *United States*, 113 F. 248, 249 (5 Cir. 1902).

While the doctrine of collateral estoppel is indeed applicable to criminal cases, *Sealfon* v. *United States*, 332 U. S. 575, 578 (1948), the party estopped from relitigating the same issues must have been a party to the initial litigation. *Serio* v. *United States*, 203 F. 2d 576, 578 (5 Cir. 1953); *United States* v. *Wapnick*, 198 F. Supp. 359, 360 (EDNY 1961), *aff'd per curiam*, 315 F. 2d 96 (2 Cir. 1963), *cert. denied*, 374 U. S. 829 (1965); *United States* v. *Kramer*, *supra* at 913. There is insufficient identity of interest between the state and federal governments in prosecuting intrastate and interstate offenses, respectively, *United States* v. *Sutton*, 245 F. Supp. 357, 359-60 (D. Md. 1965), to warrant treating the Government here as a party, or even as privy, to appellant's initial litigation which resulted in the prior acquittal in the state court.

Moreover, even if we were to treat the Government as a party to the first prosecution the appellant, in order to

sustain his claim, must show that the facts related by Cioffi which he sought to exclude from the second trial must have been "necessarily determined" by the verdict of acquittal in the first trial. *Adams* v. *United States*, 287 F. 2d 701, 705 (5 Cir. 1961). On this record we cannot ascertain the basis for appellant's former acquittal or the extent of Cioffi's testimony at that trial. Inasmuch as appellant here, in claiming an estoppel, has the burden of proving that the testified-to facts sought to be excluded at the trial below were actually concluded by the prior state court acquittal, *Moore* v. *United States*, 344 F. 2d 558, 560 (D. C. Cir. 1965); *United States* v. *International Building Co.*, 345 U. S. 502, 506 (1953), and has failed to carry his burden, his claim that the trial court erred in this particular is of no avail to him.

We have examined appellant's remaining contentions, including his claim that the trial court's charge did not adequately protect him and that the evidence was insufficient to support his conviction. We find them all to be devoid of merit.

The judgment below is affirmed.

HAYS, *Circuit Judge*:

I concur in the result.

Appendix B.

Opinion of Wyatt, *D. J.*, on Motion to Dismiss Indictment.

This is a motion for defendant Feinberg to dismiss the indictment (Fed. R. Crim. P. 12(b)(1)) or, in the alternative, for a bill of particulars (Fed. R. Crim. P. 7(f)).

The indictment is in two counts. The first count charges that the two defendants on or about July 14, 1960 transported a stolen automobile in interstate commerce. 18 U.S.C. § 2312. The second count charges conspiracy by the two defendants between January and June, 1960, to violate 18 U.S.C. § 2312 (transportation of stolen vehicles). 18 U.S.C. § 371.

Motion to Dismiss

The motion in this aspect relies on the right to a "speedy trial" under the Sixth Amendment and "unnecessary delay in presenting the charge to a grand jury" (Fed. R. Crim. P. 48(b)).

The indictment was returned on June 14, 1965 and no complaint can be made now—less than three months later—of any delay of trial after the date of the indictment.

The complaint is of the delay between the date of the offense charged (July 14, 1960) and the date of indictment (June 14, 1965). The indictment was returned within the five year statute of limitations. 18 U.S.C. § 3282.

Whether the Sixth Amendment "speedy trial" provision is ever applicable to a period before indictment need not be determined. See *Nickens* v. *United States*, 323 F. 2d 808 (D. C. Cir. 1963), cited with apparent approval in *United States* v. *Simmons*, 338 F. 2d 804 (2d Cir. 1964).

Any appeal by defendant Feinberg either to the Sixth Amendment or to Fed. R. Crim. P. 48(b) would require that some prejudice to him be shown from the delay.

United States v. *Rivera*, 346 F. 2d 942 (2d Cir. June 11, 1965); *United States* v. *Wilson*, 342 F. 2d 782, 783 (2d Cir. 1965). The lapse of time here is long, almost but not quite the length of the period of limitations. There are no facts, however, to show prejudice to the movant; it is merely said that he will be "unfairly prejudiced in presenting his defense". This is either opinion or speculation. In the absence of any facts, prejudice cannot be assumed as a matter of law from a delay within the statutory period of limitations.

The contention that the arrest and commitment (in default of bail) of co-defendant Damsky (on July 25, 1960 in the Federal District Court for the Southern District of Texas) "for all intents and purposes . . . marked the institution of proceedings" against movant cannot be taken seriously. Until the filing of the instant indictment, there was nothing for which he had "been held to answer". Fed. R. Crim. P. 48(b).

The motion to dismiss must therefore be denied.

* * * * * *

Appendix C.

Extracts from the "General Docket" of the United States Court of Appeals for the Second Circuit

"• • •

7-31-67	Judgment Affirmed, Waterman, CJ
7-31-67	Concurring in separate opinion, Hays, CJ
7-31-67	Filed judgment
8-14-67	Filed petition for rehearing/stay issuance of mandate, etc.
8-25-67	Petition for rehearing denied, mandate ordered stayed under Rule 28(c) Per Curiam
8-25-67	Filed order denying petition for rehearing, etc.
10-25-67	Issued Mandate (opinion & judgment)
11-13-67	Filed application and order (endorsed) for recall of mandate and for stay until 12-13-67, granted under Rule 28(c)

• • •"

Appendix D.

Court of Appeals Judgment and Entry Thereof in the District Court.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of July one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,

HON. LEONARD P. MOORE,

HON. PAUL R. HAYS, Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR DAMSKY,

Defendant,

MARVIN FEINBERG,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Court of Appeals Judgment and Entry Thereof in the District Court.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

A true copy.
A. DANIEL FUSARO,
Clerk.

JUDGMENT ENTERED 10/26/67.
JOHN J. OLEAR, JR.,
Clerk.

Appendix E.

Court of Appeals Order Granting Further Stay and Recalling Mandate.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of November, one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,

HON. PAUL R. HAYS, Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARTHUR DAMSKY,

Defendant,

MARVIN FEINBERG,

Defendant-Appellant.

An application having been made herein by counsel for appellant to further stay the issuance of the mandate until December 13, 1967 pending the filing of a petition for writ of certiorari to the Supreme Court of the United States and for other and further relief,

Court of Appeal Order Granting Further Stay and Recalling Mandate.

Upon consideration thereof, it is

Ordered that the mandate which issued to the Clerk of the United States District Court for the Southern District of New York on October 25, 1967 be and it hereby is recalled and its reissuance be and it hereby is stayed until December 13, 1967 subject to the provisions of Rule 28 (c)(2) of the rules of this court.

A. DANIEL FUSARO,
Clerk.

A true copy.

A. DANIEL FUSARO,
Clerk.

(SEAL)

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 854

MARVIN FEINBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On April 19, 1966, petitioner was convicted by a jury in the United States District Court for the Southern District of New York of knowingly transporting a stolen vehicle in interstate or foreign commerce, in violation of 18 U.S.C. 2 and 2312, and conspiracy to commit such offense. He was sentenced to imprisonment for a period of one year and a day on the substantive count. Imposition of sentence on the conspiracy count was suspended and petitioner was placed on probation for two years to run consecutively to the sentence on count 1. The court of appeals unanimously affirmed the judgment on July 31, 1967. A petition for rehearing was denied on August 25, 1967. The petition for a writ of certiorari was filed

November 24, 1967—61 days out of time under Rule 22 of the rules of this Court.[1]

In any event, there is no merit to the contentions urged in the petition. The record shows that in late 1959 petitioner and co-defendant Damsky were joint owners of an automobile driver school and an automobile rental company (R. 27–30). During January 1960, petitioner and Damsky were introduced to Frank Giampetruzzi at a local bar. Giampetruzzi told them he could fill their orders for any type of car for $1,000 to $1,200 each. Damsky requested him to supply them with a 1960 Lincoln Continental convertible (R. 27–34, 105–108).

On January 17, 1960, a 1960 Lincoln Continental convertible, purchased by Apex Specialty Distributors Corp. the previous month for $5,800 (list price

[1] Petitioner's counsel states that he did not learn of the denial of the petition for rehearing until November 10, 1967 (Pet. 2–4). We are informed that petitioner's present counsel, who entered the case after entry of judgment on July 31, 1967, and filed the petition for rehearing on August 14, 1967, did not file a motion for substitution of counsel or enter his appearance as attorney of record in the court of appeals until November 15, 1967. Consequently, the notice of the denial of the petition for rehearing was sent to petitioner's then attorney of record, Hyman Bravin. The clerk of the court of appeals plainly complied with customary practice. Moreover, contrary to counsel's intimated reliance on the New York Law Journal for notice, denials of petitions for rehearing are not reported in that publication.

Petitioner's reliance on *Commissioner* v. *Estate of Bedford*, 325 U.S. 283, for his suggestion that issuance of the mandate governs the time for filing a petition for a writ of certiorari (Pet. 4) is unwarranted under the present rules of the Second Circuit (See Rule 28). The time for filing the instant petition started to run upon denial of the petition for rehearing.

$7,200), was stolen (R. 7–10, 15–16, 22–24). The next day it was delivered to petitioner's business premises by John Newton, an associate of Giampetruzzi. Petitioner prepared a bill of sale, which stated that the car was free of any liens and accident claims, and which was executed by Newton before a notary public (R. 34–39, 81–100; Gov't Exh. 4). Damsky registered and insured the vehicle in his own name and obtained a $1,500 loan secured by the car (R. 42–43, 97–101). The proceeds of the loan were given to petitioner (R. 46). On April 20, 1960, title to the Lincoln was transferred to the automobile rental corporation (R. 42–43, 99–101; Gov't Exh. 5). In July 1960, Damsky took the Lincoln on a trip to Mexico. To facilitate border crossing, he took with him a statement signed by petitioner in his capacity as a corporate officer authorizing Damsky to drive the car (R. 60–64, 102–103; Gov't Exh. 6). Damsky was arrested shortly thereafter in Mexico City and returned to this country in custody (R. 60, 76–80, 129).

As bearing on knowledge and intent, the government introduced evidence showing that, shortly after receiving the Lincoln, Giampetruzzi's girl friend informed petitioner and Damsky that Giampetruzzi had been arrested and needed money for a lawyer (R. 49). Later, one Cioffi came to the automobile school offices, introduced himself to petitioner as a friend of Giampetruzzi, told petitioner he was in the business of selling stolen cars and offered to obtain any type of car for $1,000. Cioffi told petitioner that he needed counterfeit registration blanks, which he

had previously obtained from Giampetruzzi. Petitioner agreed to supply Cioffi with the counterfeit registration blanks and indicated he would buy some cars. Approximately three weeks later, petitioner sent a post card to Cioffi giving the combination of a post office box at a post office located not far from the automobile school. Cioffi went to the post office and took seven to ten counterfeit registration blanks out of the box (R. 46–48, 130–139, 161, 166–169). Thereafter, Cioffi sold a stolen 1959 Pontiac convertible to petitioner and Damsky (R. 54–55, 136, 172). There was also evidence of other transactions in stolen cars with Cioffi (R. 56–60, 139–140, 169–174, 178–180).

1. Petitioner contends that the delay of nearly five years between the commission of the offense and the return of the indictment violated his constitutional right to a prompt trial. Petitioner fails to observe that the delay complained of presents a problem quite different from that entailed by a delay following arrest and indictment. It has always been recognized that the latter sort of delay—occurring when the running of the statute of limitations has been tolled and the defendant has been incarcerated and subject to the obloquy of official accusation—involves grave dangers which are not present here. Conversely, this Court has observed that, where there has been pre-arrest delay, the statute of limitations "is usually considered the primary guarantee against bringing overly stale criminal charges." *United States* v. *Ewell*, 383 U.S. 116, 122. Indeed, there is substantial support for the view that the protection of the Sixth Amendment, like that of

Rule 48(b), F.R. Crim. P., is addressed exclusively to the post-arrest situation. See, *e.g.*, *Nickens* v. *United States*, 323 F. 2d 808 (C.A.D.C.); *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5), certiorari denied, 371 U.S. 814; *Parker* v. *United States*, 252 F. 2d 680 (C.A. 6), certiorari denied, 356 U.S. 964; *Foley* v. *United States*, 290 F. 2d 562 (C.A. 8), certiorari denied, 368 U.S. 888. In all events, we can find no support for the view that a defendant may assert pre-arrest delay as a bar to a prosecution commenced within the applicable period of limitations without demonstrating that he has been materially prejudiced thereby. See, *e.g.*, *United States* v. *Ewell*, 383 U.S. 116, 122; *Tynan* v. *United States*, 376 F. 2d 761 (C.A.D.C.); *United States* v. *Bennett*, 364 F. 2d 499, 500 (C.A. 2); *Harlow* v. *United States*, 301 F. 2d 361 (C.A. 5). Hence, without some showing of prejudice to the defense, there is no reason why the government should be called upon to explain, or a court required to consider, whether an indictment brought within the applicable limitations period could or should have been brought sooner.

The court of appeals found on the record here that there was no plausible claim of prejudice (Pet. App. 28–31). Petitioner bases his claim of prejudice exclusively on an asserted diminution of recall. However, the record references cited by petitioner (Pet. 12–13) show, and the court of appeals found (Pet. App. 30–31), that petitioner's recall, except for isolated instances when confronted with his prior inconsistent statement, was detailed and specific. Similarly, lapses of recall of government witnesses were minor and re-

lated to non-essential detail. Petitioner and Damsky both knew shortly after the offense that they were under serious investigation concerning a number of stolen cars, and their experiences during the investigation were likely to fix the events and circumstances concerning the 1960 Lincoln in their memory. Cf. *United States* v. *Ewell*, 383 U.S. 116, 122. Moreover, substantial documentation of the pertinent transactions and use of the vehicles was available to refresh the recollection as to dates, sequence of events and person involved. The record shows that the prosecution was solidly founded on reliable testimony supported by documentary evidence. There is thus no occasion for this Court to review the determination of the court below that the instant record established that the delay here was not prejudicial to the defense.

2. Petitioner's contention that he should have had a preliminary hearing outside the presence of the jury on the voluntariness of an exculpatory statement that he had given to police shortly after co-defendant Damsky was arrested in Mexico (Pet. 9–10, 16–19) is without merit.[2] Petitioner took the stand in his own de-

[2] We do not read the petition as suggesting that the finding of voluntariness by the judge and jury was not adequately supported by the record. In any event, the record does not reveal "a credible possibility" that the statement was coerced (Pet. App. 38). Petitioner testified on re-direct that the statement had been given after he had been questioned for about three hours by a detective of the New York City Police Department and after he had been provided with food and drink and allowed to communicate with his wife. He admitted that there had been no threats of physical harm and the most threatening thing said was that he was "in a lot of trouble" (R. 339–351). Petitioner never requested counsel. The trial took place prior to the decision in *Miranda* v. *Arizona*, 384 U.S. 436.

fense. On cross-examination, the government showed him the statement to refresh his recollection or, that failing, to impeach his direct testimony. The court declined to conduct a preliminary hearing outside the presence of the jury, but permitted petitioner to develop fully the circumstances surrounding the making of the statement on re-direct examination. The judge indicated that he regarded the statement as voluntary (R. 447–448) and submitted the issue to the jury under appropriate instructions requested by petitioner (A. App. 119a; G. App. 86a). While a preliminary hearing would have been desirable, the procedure followed here does not in the circumstances constitute reversible error. "This Court has never ruled that all voluntariness hearings must be held outside the presence of the jury, regardless of the circumstances." *Pinto* v. *Pierce*, No. 284, October 24, 1967. Petitioner has had an independent judicial determination that his statement was voluntary. The failure to hold a preliminary hearing did not prejudice his privilege to refuse to testify since he had already taken the stand when he was confronted with his statement on cross-examination. Thus, the purposes to be served by a preliminary hearing were not defeated here.

3. Cioffi testified concerning petitioner's participation in the purchase and registration of a stolen Pontiac in April 1960. That testimony was offered as bearing on the issue of intent and guilty knowledge. Petitioner had previously been acquitted in a State court of unlawfully receiving the Pontiac. Nevertheless, Cioffi s testimony clearly did not violate the double jeopardy clause, as petitioner urges, since the

two trials were prosecuted by different sovereigns for distinct offenses. *Abbate* v. *United States,* 359 U.S. 187. Nor is there any basis for concluding that Cioffi's testimony should have been excluded under the doctrine of collateral estoppel. The United States was not estopped by the State litigation to which it was not a party. Moreover, it does not appear that the State verdict "necesarily determined" the factual issue as to which Cioffi testified. See *Adams* v. *United States,* 287 F. 2d 701, 704–705 (C.A. 5); see also *Abbate* v. *United States,* 359 U.S. 187, 200 n. 4 (opinion of Mr. Justice Brennan); *Hoag* v. *New Jersey,* 356 U.S. 464, 471.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
PAUL C. SUMMIT,
Attorneys.

DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 854

MARVIN FEINBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY LEO ROTHSCHILD,
Counsel for Petitioner,
Office & P. O. Address,
10 East 40th Street,
New York, N. Y. 10016.
Tel.: 212—LE 2-3265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 854

MARVIN FEINBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In its opposition, the United States ignores both the Court of Appeals' order, recalling its mandate and staying reissuance thereof, and, also, U.S.C. Title 28, § 2101(f), authorizing that very procedure to "enable the party aggrieved to obtain a writ of certiorari from the Supreme Court" (Appendix E, annexed to the Petition, at p. 47; and the statute, to which reference is made at P. 4 of the Petition). Accordingly, the United States' observation is incorrect, to the effect that the petition was filed "61 days out of time under Rule 22 of the rules of this court" (United States' Memorandum, pp. 1-2). The petition was filed in time (see discussion, Petition, at P. 4).

Moreover, the United States overlooks that the Court of Appeals' mandate, "opinion and judgment" was not issued until a whole month after rendition of its order denying rehearing—i.e., October 25, 1967 (Appendix C, annexed to Petition, at P. 44). Since the petition for

certiorari was filed on November 24, 1967, it was, therefore, in time, on that score, too.

Accordingly, the precise circumstances under which *Commissioner* v. *Estate of Bedford* (325 U. S. 283), was decided by this Court, are now again duplicated. The issue is not what would be the case had judgment and mandate come down together, and had not a petition for certiorari been filed within the further stay allowed therefor by the Court of Appeals, but whether, given all of these circumstances, and in the face of a clear record—staying the operation of the judgment, and keeping the time of the Petitioner open—his petition should fail of consideration on its merits.

Furthermore, this being a criminal case, the time for application to this court, is fixed only by its own rules, dispensation of which lies within its own discretion.

Finally, we know of no basis for the observations made by the United States in the footnote at P. 2 of its Memorandum. Our information is otherwise. The Court of Appeals, by its order, showed that it also thought otherwise. But, since the foregoing observations would seem to be dispositive, we do not dwell further upon the United States' collateral observations, which are without support in the record.

As to the merits, it is plain that the issue as to a "speedy trial" under the Sixth Amendment, with reference to pre-indictment delay, is of first impression in this Court.

We therefore pray that this Court grant certiorari, so that, in the public interest, and that of Petitioner as well, the issue may be definitively determined by this Court.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Counsel for Petitioner,
Office & P. O. Address,
10 East 40th Street,
New York, N. Y. 10016.

Tel.: 212—LE 2-3265